ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
	)	
Rate Regulation	)	

OPPOSITION TO PETITION FOR RECONSIDERATION

Cablevision Industries Corporation; MultiVision Cable TV Corp.; Providence Journal Company[1] and Sammons Communications, Inc. ("Cable Companies"), by their attorneys, hereby submit this opposition to the petition of New York Telephone Company and New England Telephone and Telegraph Company ("NYNEX") for reconsideration of the Commission's Second Report & Order affirming the inclusion of low penetration systems in its calculation of rate regulation benchmarks.[2] The NYNEX petition offers only a brief recitation of arguments already carefully considered and rejected by the Commission, while failing even to address the controlling case on which the Commission's ruling soundly relied. NYNEX's complaint, in essence, rests on its view that a more appropriate -- read draconian -- measure of

---

[1] Providence Journal Company conducts its cable television operations through its subsidiaries Colony Communications, Inc. and King Videocable Company.

[2] First Order on Reconsideration, Second Report & Order, and Third Notice of Proposed Rulemaking, MM Docket No. 92-266, FCC 93-428 (released August 27, 1993) ("Second Report & Order").

effective competition would ignore low penetration systems, if only the plain language of the Cable Television Consumer Protection and Competition Act (the "1992 Cable Act" or "Act") would get out of the way.

The Commission's Second Report & Order squarely addressed the case against including in its benchmark calculations the rates of systems qualifying as subject to "effective competition" based on penetration of less than 30 percent. See 47 U.S.C. § 543(l)(1)(A). NYNEX and certain other commenters had claimed that the Act's definition of "effective competition" only applied for jurisdictional purposes and did not bind the Commission in establishing the benchmarks rates for systems subject to regulation. The plain language of the Act, however, simply belies this interpretation.[3] Citing the lessons of an earlier

---

[3] "Effective competition" is defined for all purposes in the 1992 Cable Act's rate regulation provisions to include cable systems with less than 30 percent penetration. 47 U.S.C. § 543(l)(1)(A). The provisions specifically governing basic rate regulation, in turn, expressly cite "effective competition" not only as the standard for whether systems are subject to regulation, but also as the standard for how rate regulation should be formulated where applicable: Commission "regulations shall ... protect[] subscribers of any cable system that is not subject to effective competition from rates ... that exceed the rates that would be charged ... if such systems were subject to effective competition." Id. at § 543(b)(1). This section further specifies that, in prescribing basic rate regulations, "the Commission ... (C) shall take into account ... (i) the rates for cable systems, if any that are subject to effective competition." Id. at § 543(b)(2)(C)(i). The Act's standards for rate regulation of cable programming services likewise expressly calls for

(continued...)

Commission's ill-fated attempt to disregard clear statutory definitions governing cable rate regulation, the Commission appropriately ruled that it was not "free to change the definition of systems subject to effective competition merely because petitioners might devise a definition they think is more appropriate." Second Report & Order at ¶ 131.[4]

Not even attempting to address this controlling ACLU precedent, NYNEX now seeks reconsideration on the well-trod grounds that "effective competition" is only one of several statutory factors governing the standards for rate regulation and that Congress did not mandate that any one of these

---

[3](...continued)
consideration of "the rates for cable systems, if any, that are subject to effective competition." Id. at § 543(c)(2)(B).

Legislative intent to strictly control the meaning and application of a statutory term is particularly unambiguous where that language is explicitly identified as a defined term, which "controls the construction of that term wherever it appears through the statute." Florida Dep't of Banking and Finance v. Board of Governors of the Federal Reserve System, 800 F.2d 1534, 1536 (11th Cir. 1986), cert. denied, 481 U.S. 1013 (1987). Moreover, the Act's legislative history reveals congressional concern regarding prior FCC redefinitions of this very term and thus a direct legislative intent to reserve to Congress full control over the defining of "effective competition." See H.R. Rep. No. 628, 102d Cong., 2d Sess. 33 (1992).

[4] In a case on all fours with this current matter, the D.C. Circuit admonished an earlier Commission that it did not "enjoy discretion to adopt, as part of its regulations implementing the Cable Act, a definition of a particular term that is at odds with a definition of that very term contained in the Act itself." American Civil Liberties Union v. FCC, 823 F.2d 1554, 1567 (D.C. Cir. 1987), cert. denied, 485 U.S. 959 (1988).

factors be given greater weight than another. The Cable Companies agree with this observation.[5] To conclude on this basis, however, that the Commission is free to exclude low penetration systems in its formulation of rate regulation benchmarks is simply a non sequitur. That the Commission could have, or even should have, taken greater account of additional factors in no way means that the Commission has any discretion to redefine the factor regarding "effective competition." The subset of systems subject to "effective competition" that NYNEX favors is not, in fact, mandated or even supported by consideration of any of those other statutory criteria.[6] The Commission is simply not afforded the discretion under the Act that NYNEX wishes it had to redefine "effective competition" -- even under the guise of

---

[5] The Cable Companies do not believe that the 1992 Cable Act requires, or even permits, the Commission to focus exclusively on the rates of systems subject to "effective competition" -- and not the individual costs of providing cable service enumerated in the statute -- as the sine qua non of its rate regulation standards. However, inasmuch as the Commission has chosen to construct benchmarks fully based upon a survey of systems subject to "effective competition," the Act's plain language and purpose and the controlling judicial precedent operate to bar the Commission from redefining that term as NYNEX wishes it to read.

[6] Indeed, none of these other criteria in any way delineates the categories of systems which Petitioner submits should serve as the paramount standard for rate regulation. Statutory provisions cited by NYNEX, moreover, demonstrate that Congress was fully capable of using the concept of "multichannel competition," rather than "effective competition," where it intended to do so.

"considering" or "taking into account" this statutory term as but one of many factors.[7]

Even if the Commission were at liberty to redefine "effective competition," moreover, the Commission appropriately found that excluding such systems from benchmark calculations would be imprudent as a matter of policy, as well. The Second Report & Order (at ¶ 129) duly noted the antitrust support and logical consistency of concluding that low penetration systems lack the market share necessary to attain monopoly profits. If the Commission were nonetheless to consider rejecting such rates as "too low," it would likewise be obligated to consider more seriously the record evidence that rates charged by systems in the two other statutory categories -- head-to-head cable competitors and municipally-owned systems -- are "too low" as judged by a truly sustainable competitive equilibrium.

The 1992 Cable Act simply preempts the need for any such debate, however. The Act explicitly and unambiguously defined the categories of systems facing effective competition -- and thus the Commission appropriately ruled that each of those categories must be included in calculating any "competitive" benchmark for rate regulation. NYNEX's

---

[7] Given the draconian reduction in rates that would likely result from the exclusion of the low penetration sample, nothing short of explicit legislative redefinition of "effective competition" would warrant Commission reversal of its careful reading of the statute in this regard.

petition demonstrates little more than its continued disappointment over this plain reading of the statute and, accordingly, should be denied.

Respectfully submitted,

CABLEVISION INDUSTRIES CORPORATION
MULTIVISION CABLE TV CORP.
PROVIDENCE JOURNAL COMPANY
SAMMONS COMMUNICATIONS, INC.

By: _____

John I. Davis
Peter D. Ross
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000

November 29, 1993

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of November, 1993, I caused copies of the foregoing "Opposition to Petition for Reconsideration" to be mailed via first-class postage prepaid mail to the following:

Mary McDermott, Esq.
Shelley E. Harns, Esq.
120 Bloomingdale Road
White Plains, NY 10605
Counsel for New York Telephone Company and New England Telephone and Telegraph Company

Diane Lewis